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Gerald L. Neuman. *Strangers to the Constitution: Immigrants, Borders and Fundamental Law.* New Jersey: Princeton University Press, 1996. xii + 283 pp. $39.50 (cloth), ISBN 978-0-691-04360-9.

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Law and Nationhood in the New World Order

In *Strangers to the Constitution*, Professor Gerald Neuman of Columbia Law School approaches head-on current controversies relating to illegal aliens, foreign nationals, and constitutional rights both from historical and theoretical perspectives. Arguing that "no human being subject to the governance of the United States should be a stranger to the Constitution" (p. 189), Neuman urges Americans to ratify a "constitutional geography" in which government action at home or abroad would almost always bring with it basic constitutional rights to citizens and aliens. Although Neuman addresses several discrete policy debates, *Strangers to the Constitution* effectively invites us to recognize the broad significance of the challenges posed by global migration and the American-led "New World Order."

The book divides its topic into two sections–"the past" and "the present and the future." In the first section, Neuman summarizes the current state of historical knowledge to show two things. First, he explains how immigration regulation has been historically exempted in large part from constitutional scrutiny–the one glaring exception being the guarantee of "birthright citizenship" to American-born children of aliens. Second, he explains how substantive constitutional rights have been essentially withheld from foreign nationals who otherwise find themselves subject to federal power. Neuman deserves high praise both for advancing these two points in clear and accessible ways and for making an original argument that deserves closer attention from American historians. He shows that, if we believe that Americans enjoyed "open borders" from 1789 until the 1924 National Origins Act, we believe a myth–because state and local government has always regulated the movement of people across legal borders through the use of criminal laws, vagrancy laws, quarantine laws, registration laws, and (before 1865) the law of slavery. On this point, I found Neuman's book to fit quite well with the challenging new synthesis of nineteenth-century legal history offered by University of Chicago historian William Novak, author of *The People's Welfare* (1996). Novak argues that the states' police powers, which combined to form what he calls the "well-regulated society," pervaded Americans' everyday lives from the founding through the late nineteenth century. Taken together, Neuman's and Novak's studies suggest that our sense of statehood has been worked out in rather provincial politics and mundane spheres of law enforcement, rather than the airy realm of constitutional abstactions. And as Neuman recognizes, although the Fourteenth Amendment certainly changed the rules of the game, it too has a specific history–classically recounted by Professor William E. Nelson of New York University Law School in *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988)–which could not possibly eclipse all localist expressions of American identity.

Switching gears in his book's second section, Neuman turns to policy analysis. Using the elegant notion of "constitutional geography"–the political realm in which constitutional rights apply and where federal power reaches, though not coterminously–Neuman ex-

amines issues concerning the constitutional rights of aliens abroad, rights of immigrants, and birthright citizenship. In each case, he favors protecting and expanding the constitutional rights of these groups. He also identifies a unifying normative principle of his rights-based politics–the principle of what might be called "where the federal government acts, constitutional rights must follow"–and in the process rejects competing principles based on universal rights and social contractarian rights. This principle, evocative of the maxim "the Constitution follows the Flag," in fact goes further–for it would not only extend rights abroad but preserve birthright citizenship and extend aliens' rights within the national boundaries of the United States. Those who may be sympathetic to Neuman's goals might nevertheless be suspicious that his principle could invite mischief in the way the Fourteenth Amendment was used to make citizens out of corporations as explained by Professor Morton Horwitz of Harvard Law School in *The Transformation of American Law: The Crisis of Legal Orthodoxy* (1992). Would Neuman's principle permit foreign corporations adversely affected by American law to invoke the "takings" clauses of the Fifth and Fourteenth Amendments? Neuman does not fully consider the unhappy consequences of enacting a principle of constitutional interpretation that would effectively bind any exercise of federal power in a global context.

Neuman's book suggests that he is stretching to make broad and sophisticated claims about the nature of sovereignty even though his feet seem firmly planted in concrete debates over restrictionism. Indeed, Neuman's passions are most clearly communicated in his spirited defense of "birthright citizenship," a constitutional right carefully criticized by legal scholars Peter Schuck and Rogers Smith in their study *Citizenship without Consent* (1985). Neuman is probably correct that abandoning that right will divide American-born children into separate and unequal castes based on the citizenship of their parents: beach-going, healthy, educated children nurtured in suburban cul-de-sacs, versus exploited, unvaccinated, illiterate aliens coping in the city's streets. It is that future that Neuman's writing depicts most vividly, especially in comparison to his defense of the rights of foreign nationals affected by American law abroad.

Whether or not expanding the scope of fundamental law will ultimately vaccinate children living in Los Angeles, Neuman's entry into the normative terrain staked out by Schuck and Smith implicitly accepts the problematic assumption that Fourteenth Amendment jurisprudence is the heart of our national community. Given the current configuration of politics in the United States, and in particular in California, Neuman's constitutional evangelism–a faith rooted in Equal Protection law and in the public policy of affirmative action–seems stubbornly nostalgic, even quixotic. Most observers of all political stripes agree that liberal constitutionalism is now (and has been for a while) on the defensive. Instead of preaching the gospel, Neuman might have marked out a less ambitious but more workable position by first defending the constitutional status quo regarding birthright citizenship–perhaps along the lines of the argument made by Professor Christopher L. Eisgruber of New York University Law School in "Birthright Citizenship and the Constitution" (*NYU Law Review* 72 [1997]: 54-96)–and then extending his historical analysis of the idea of America as a community expressed in the tradition of what Novak calls "the well-regulated society." The Constitution never has and cannot bear the weight of what philosopher John Dewey called "The Great Community."

Nevertheless, Neuman's bold book should provoke historians to reexamine the legal history of immigration, and it will undoubtedly influence constitutional theorists and policy-makers.

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